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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CITY OF OAKLAND, Plaintiff and Respondent, v. ISAAC PITTMAN et al., Defendants and Appellants.	A136606 (Alameda County Super. Ct. No. RG11573703)

INTRODUCTION

Defendants Isaac Pittman and Jessie Pittman, his daughter, appeal from a judgment entered by the Alameda County Superior Court, following the court's entry of summary judgment in favor of plaintiff City of Oakland (the City) on the City's action for breach of a settlement agreement between the parties.[1] The settlement agreement addressed illegal activities taking place at property owned by defendants and required defendants to take certain measures to abate the drug nuisances and avoid "costly litigation." Defendants' sole challenge is to the court's award of $15,000 liquidated damages in connection with their breach.

Defendants contend summary judgment was improper because triable issues of fact existed with respect to whether defendants and the City actually negotiated the liquidated damages provision of the contract and whether defendants understood it at the time they entered the settlement agreement. Defendants further contend the amount of

[1] Jessie Pittman has filed the appeal in propria persona on behalf of herself and Isaac Pittman, in whose behalf she is authorized to act.

liquidated damages was not reasonably related to the City's actual damages and, therefore, constituted an unenforceable penalty. We shall affirm.

BACKGROUND

It is undisputed that on April 15, 2010, defendants, owners of the subject property at 2338 88th Avenue in Oakland, entered into a settlement agreement with the City to abate drug nuisance activity associated with the property "in the interest of avoiding costly litigation which could result in civil penalties as high as $25,000.00 and a possible forced sale of the property . . . ." The property has had a long history of unabated drug nuisance activity.

The agreement set forth various obligations to be performed by defendants for a term of two years, including, among other things: tenant screening; timely eviction of problem tenants; reporting of any illegal activity on the property of which defendants became aware; adoption of a no loitering policy, with appropriate signage and reporting responsibility by defendants; securing all access to the property via the front gate, including monitoring and securing the gate at all times; installation and maintenance of motion-activated lighting illuminating the exterior of the property after dark; and obtaining stay-away or restraining orders against persons associated with drug nuisance on the property, including twelve named individuals. Defendants also agreed to pay a $1,000 performance bond, to be refunded two years after execution of the settlement agreement, if defendants had fully complied with the agreement and absent a material breach. The City agreed to stay the filing of any civil action against defendants for drug related arrests at the property occurring before execution of the agreement.

As relevant to the summary judgment entered here, paragraph D.2 of the settlement provided as follows:

"**Costs and Fees:** In consideration for Owner entering into the Agreement, City agrees to forgive investigative costs incurred by the Oakland Police Department due to nuisance activity at the Property, and attorney fees. However, should a material breach of the agreement occur or should the City bring further legal action against Owner, any forgiven Oakland Police Department and City Attorney fees and costs shall be due. In

case of material breach, Owner agrees to pay police investigatory costs involved in monitoring and enforcing the Agreement as to Owner's alleged breach, but not as to any other routine arrests, reports or other monitoring done by the police, including as a result of Owner's calls to notify the Police of potential incidents to be investigated. The City agrees that the Police Department will use best efforts to cooperate with Owner, and Owner will not be charged fees or costs for normal police activities or for acting in cooperation with the Police. Should a material breach of this Agreement occur, Owner agrees to pay attorney fees involved in the monitoring and enforcement of the Agreement. *In the event of a material breach by owners, Owners agree to pay liquidated damages in the amount of $15,000.00.*" (Italics added.)

On May 2, 2011, the City filed an action for breach of contract against defendants based on various material violations of the agreement. City moved for summary judgment and on April 10, 2012, the court granted the City's summary judgment motion, stating that "[t]here is no triable issue of material fact that Defendants entered into a settlement agreement with the City, the City has performed under the agreement, Defendants have breached the agreement and the City has been damaged." The judgment entered by the court ordered defendants to perform a number of obligations previously set forth in the settlement agreement. It further ordered the $1,000 performance bond forfeit and ordered defendants to "Pay $15,000 in damages pursuant to Section D(2) of the agreement;" and to "Pay the City reasonable attorney's fees for this action pursuant to Section D(2) of the agreement." The judgment also ordered that "[i]f Defendants . . . fail to perform each obligation ordered above, the City is authorized to perform each of the obligations not performed by Defendants and obtain reimbursement from Defendants for the costs of performing each obligation." Any costs incurred by the City to perform the listed obligations or any other costs due under the judgment were ordered to be secured by a deed of trust against the property.

This timely appeal followed.

Defendants do not challenge the court's determination that they materially breached the settlement agreement. Rather, they challenge only the award of liquidated damages.

I. Summary Judgment

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. . . ." (Code Civ. Proc., § 437c, subd. (a).) " 'Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. [Citation.] In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. [Citation.] Accordingly, we are not bound by the trial court's stated reasons and review only the ruling, not its rationale.' (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 732 . . . .)" (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 520–521.)

"A plaintiff . . . has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p).)

II. The Law of Liquidated Damages

The law of liquidated damages was recently summarized by the Court of Appeal in *McGuire, supra,* 220 Cal.App.4th 512, 521:

" 'The term "liquidated damages" is used to indicate an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement, and which may not ordinarily be modified or altered when damages actually result from nonperformance of the contract.' [Citation.] 'Liquidated damages constitute a sum which a contracting party agrees to pay or a deposit which he agrees to forfeit for breach of some contractual obligation.' (*ABI, Inc. v. City of Los Angeles* (1984) 153 Cal.App.3d 669, 685, italics omitted.) A liquidated damages provision in a contract 'normally stipulates a pre-estimate of damages in order that the parties may know with reasonable certainty the extent of liability for a breach of their contract.' (*Ibid*.)

" 'Under the 1872 Civil Code, a provision by which damages for a breach of contract were determined in anticipation of breach was enforceable only if determining actual damages was impracticable or extremely difficult.' (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977, citing 1872 Civ. Code, §§ 1670, 1671.) 'Departing radically from the former law, on July 1, 1978, the Legislature repealed Civil Code section 1670, and amended section 1671 in order to express a new policy favoring the enforcement of liquidated damage provisions except against the consumer in a consumer case. (Civ. Code, § 1671, subds. (b) and (c); see Cal. Law Revision Com. comment on § 1671, subd. (b).) In pertinent part, subdivision (b) of Civil Code section 1671 now provides that ". . . *a provision in a contract liquidating the damages for the breach of a contract is valid unless the parties seeking to invalidate the provision establish*[] *that the provision was unreasonable under the circumstances existing at the time the contract was made*." ' (*ABI, Inc. v. City of Los Angeles, supra,* 153 Cal.App.3d at pp. 684–685, italics omitted [by *McGuire* Court].) [Italics above added by this Court.]

" 'A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under section 1671[, subdivision] (b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would

flow from a breach. The amount set as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained." [Citation.] In the absence of such relationship, a contractual clause purporting to predetermine damages "must be construed as a penalty." [Citation.] "A penalty provision operates to compel performance of an act [citation] and usually becomes effective only in the event of default [citation] upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach [citation]. The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. [Citations.]" [Citation.]

" 'In short, "[a]n amount disproportionate to the anticipated damages is termed a 'penalty.' A contractual provision imposing a 'penalty' is ineffective, and the wronged party can collect only the actual damages sustained." ' (*Ridgley v. Topa Thrift & Loan Assn., supra,* 17 Cal.4th at pp. 977–978.) [¶] . . . [¶] 'Whether the amount to be paid upon breach of a contractual term should be treated as liquidated damages or as an unenforceable penalty is a question of law, which we review de novo.' (*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163Cal.App.4th 495, 499.) More broadly, unless it turns on the credibility of extrinsic evidence, the interpretation of a written contract is solely a judicial function, and an appellate court is not bound by the trial court's construction of the contract." (*McGuire, supra,* 220 Cal.App.4th at pp. 521–523.)

With these principles in mind, we turn to the issues presented here.

III. Discussion

A. *Defendants' understanding of the provision*

On appeal, defendants argue "[t]here is no evidence that the liquidated damages provision was specifically discussed, or that the parties to the contract ever even considered the nature and import of this provision." Defendants appear to make this argument for the first time on appeal. They did not make such a claim in the declaration filed by them in opposition to summary judgment. Indeed, they did not mention the

liquidated damages provision at all in the declaration. Defendants may be held to have forfeited such argument on appeal by failing to raise it below. (See Eisenberg, et al., Civil Appeals and Writs (The Rutter Group 2013) ¶¶ 8:229, 8:265, pp. 8-156, 8-265.)

In any event, the claim is without merit. Defendants admitted that, "None of the terms of the Contract were terminated by agreement, *nor were any terms of the contract unenforceable, nor were any terms of the contract ambiguous*." (Italics added.) Furthermore, a declaration by attorney David Hall, the attorney who drafted the settlement agreement on behalf of the City stated he had "thoroughly reviewed the Contract with [defendants] before they signed the document, explaining each of the Contract's provisions" and "I answered any questions [defendants] had about the Contract before they signed the document." This declaration supported the undisputed fact that before defendants signed the settlement agreement, Hall "thoroughly reviewed the [agreement] with Isaac Pittman and Jessie Pittman, and he answered any questions [they] had regarding the terms of the Contract." Hence, the only evidence before the trial court as to defendants' understanding of the provision were defendants' admissions that none of the terms were unenforceable or ambiguous, Hall's declaration, and the settlement agreement itself. No disputed material issue of fact existed regarding defendants' understanding of or agreement to the liquidated damages provision.

Nor do we find merit in defendants' suggestion that the liquidated damages provision was unenforceable on the ground it was not the product of negotiations between the parties. Even in the more strictly assessed consumer case context, it has been held that a *reasonable* liquidated damages provision is valid, even absent proof of actual negotiations. (*Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern California, Inc.* (2006) 135 Cal.App.4th 1023, 1035 [explaining the derivation of the reasonable endeavor test and its application in the consumer context and concluding that actual negotiation is not required for a finding of a reasonable endeavor to estimate damages because, on an objective basis, the reasonableness of the amount is the determinative factor].)

B. ***Reasonableness of the liquidated damages provision***

Defendants main contention is that the sum of $15,000 was unreasonable as an estimate of damages that might result from breach and was, therefore, unenforceable as a penalty. As observed above, in contexts other than consumer cases or leases of dwellings, the modern version of California's liquidated damages statute has switched the presumption from one of invalidity to one of validity. (Civ. Code, §1671, subd. (b); *McGuire, supra,* 220 Cal.App.4th at pp. 522; *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 654 (*Weber*); 1 Witkin, Summary of Cal. Law (10th ed. 2005) §§ 533-534, pp. 578-580.) "Among the reasons favoring such provisions is reduction of litigation. [Citation.]" (*Weber, supra,* 52 Cal.App.4th at p. 654.) "Thus, the burden of proving that the clause is unreasonable at the time the contract was made is placed on the [d]efendants." (*Radisson Hotels Intern., Inc. v. Majestic Towers, Inc.* (C.D. Cal. 2007) 488 F.Supp.2d 953, 959 (*Radisson*).)

"This standard permits a considerable degree of latitude in fixing the sum of liquidated damages . . . [¶] ['g]iven the current statutory policy which favors the validity of such agreements except in certain consumer transactions, and *which casts the burden on the opposing party to prove unreasonableness and requires only that the liquidated damages bear a reasonable relationship to the range of harm that might reasonably be anticipated*.['] [(]*Weber,* [*supra,*] 52 Cal.App.4th at [p.] 656.[)] [¶] The clause becomes an unenforceable penalty only 'if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from the breach.' [Citation.]." (*Radisson, supra,* 488 F.Supp.2d at p. 959, italics added.)

Defendants argue that the inclusion of the $1,000 deposit paid at the beginning of the contract and forfeited upon its breach "tends" to prove that the liquidated damages sum was purely arbitrary. We disagree. Defendants do not explain how the existence of this deposit, which appears to aim at motivating prompt compliance with the terms of the settlement agreement—by giving defendants not just something to lose from breach, but something to recover from full performance—tends to undermine the liquidated damages provision as a reasonable estimate of the range of harm that reasonably might be

anticipated from defendants' breach of the agreement. Nor does the existence of a separate attorney's fee provision undermine the reasonableness of the liquidated damages provision. The two provisions serve different purposes and do not overlap.

The settlement agreement contained both a provision that, "In case of material breach, Owner agrees to pay police investigatory costs involved in monitoring and enforcing the Agreement as to Owner's alleged breach" and the liquidated damages provision. We note the court did *not* assess both liquidated damages and these specified "police investigatory costs" related to this breach. Our reading of the settlement agreement persuades us that the liquidated damages provision was intended to incorporate these specified "police investigatory costs" arising from a material breach, in addition to other reasonably expected damages. Nothing in this opinion is intended to suggest that additional monetary damages for the breaches that are the subject of this action may be assessed. [2]

Defendants maintain that the declaration of Oakland Police Officer Steve Vierra in support of the summary judgment motion does not indicate the liquidated damages were reasonable, as he only describes driving by the property two or three times a week between April 15, 2010 and January 5, 2012, along with 20 to 30 observations at the property over the same period. Defendants also argue that Vierra's declaration does not clarify whether these observations are routine monitoring of the neighborhood or were made specifically to enforce the agreement. (As to this last point, Vierra's declaration that he frequently drove by the property to "ensure that the Pittman's are in compliance with the Contract" indicates more than mere "routine" monitoring of the neighborhood.) We disagree with defendants' claim that this declaration indicates the liquidated damages were not reasonable.

[2]Nor do we mean to suggest the court could not properly order, as it did, that going forward, defendants must perform various actions with respect to the property and that they would be required to reimburse the City for any costs it incurred in performing those obligations, should defendants fail to do so.

First, Vierra's declaration documented many specific breaches of the agreement and supported the City's assertion that defendants had materially breached the settlement agreement in numerous respects. It was not directed at providing a basis for estimating the range of damages that might accrue from a *breach* of the agreement or the full costs to the police department of coping with continued drug-related criminal and nuisance activity associated with the property. It does provide some information as to the considerable time and effort spent by *this one officer* in monitoring and attempting to enforce compliance with the settlement agreement. It does not appear to us unreasonable to conclude that $15,000 would be within the reasonable range of costs for police department to cope with the harm caused by breach of the settlement agreement, if that were the *only* measure of harm.

Second, Defendants have provided no support for their apparent assumption that police monitoring time is equivalent to the reasonable range of harm that could be anticipated from their breach of the settlement agreement. Given the persistent and wide ranging history of drug-related activities at the property, we must conclude it would have been extremely difficult to quantify at the outset the full extent of damages that might reasonably be expected to result from breach of the contract, not only including police enforcement time and costs, but also including the costs of *additional harms* that reasonably could be expected to result from a material breach of this agreement, such as the nuisance impacts on City Code enforcement, impacts on police resources, and the negative impact on the immediately surrounding neighborhood and the City as a whole.

We conclude the trial court did not err in granting summary judgment in favor of the City.

DISPOSITION

The judgment is affirmed. The City is awarded its costs on this appeal.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.